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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: MCKINSEY & CO., INC.  
NATIONAL PRESCRIPTION OPIATE  
CONSULTANT LITIGATION

This document relates to: ALL POLITICAL  
SUBDIVISION AND SCHOOL DISTRICT  
ACTIONS

Case No. 21-md-02996-CRB

**JOINT STATUS REPORT**

Counsel for McKinsey and Plaintiffs' Lead Counsel respectfully submit this Status Report  
as ordered by the Court during the Final Approval Hearing held on February 2, 2024, to apprise  
the Court of the current number of Political Subdivision and School District Opt-Outs, and to

1 assist the Court’s consideration of how to proceed with the litigation of the Political Subdivision  
2 and School District Opt-Out Actions.<sup>1</sup>

3 **I. Status of Opt-Outs**

4 In total, 79 Political Subdivision Plaintiffs and 10 School District Plaintiffs (collectively,  
5 the “Political Subdivision and School District Opt-Outs” or “Opt-Outs”) timely opted out of the  
6 Political Subdivision Settlement and the School District Settlement (collectively the  
7 “Settlements”), which this Court approved on February 2, 2024. These are the totals after 2  
8 Political Subdivisions and 30 School District Opt-outs rescinded their opt-out notices and agreed  
9 to be bound by the Settlements. Attached as Exhibit A is the current list of Political Subdivision  
10 Plaintiffs (“Political Subdivision Opt-Outs”) that have opted-out of the Political Subdivision  
11 Settlement, and attached as Exhibit B is the current list of School District Plaintiffs (“School  
12 District Opt-Outs”) that have opted-out of the School District Settlement.<sup>2</sup> Attached hereto as  
13 Exhibit C is a list of the 6 Political Subdivision and School District opt-out actions that are  
14 currently pending in this MDL (the “Opt-Out Actions”).

15 **II. The Parties’ Disputed Positions Regarding Continuing Proceedings with the**  
16 **Political Subdivision and School District Opt-Outs**

17 **McKinsey’s Position**

18 This Court should now proceed to decide McKinsey’s pending threshold Motion to  
19 Dismiss on the grounds of Release/Res Judicata (“Release/Res Judicata Motion”) (ECF Nos. 310-  
20 312), which the Court had been holding in abeyance at the request of the parties since October,  
21 2022, pending their settlement discussions and final approval of the Settlements. Now that the  
22 Settlements have been approved, McKinsey respectfully submits that it would be appropriate for  
23

24 \_\_\_\_\_  
25 <sup>1</sup> ECF No. 667 (Transcript of Proceedings held on February 2, 2024) at 13:3-15:19.

26 <sup>2</sup> As discussed below, certain Political Subdivision Opt-Outs have asked for more time to consider  
27 rescinding their opt-out notices.

1 this Court to decide the pending Release/Res Judicata Motion with respect to the Opt-Out Actions,  
 2 which were all brought by Political Subdivision and School District Opt-Outs from 4 states.<sup>3</sup>

3 If any Opt-Out Actions survive McKinsey's Release/Res Judicata Motion, the Court  
 4 should decide McKinsey's Motion to Dismiss for Failure to State a Claim pursuant to Federal  
 5 Rule 12(b)(6) (ECF No. 573) (the "12(b)(6) Motion"), also with respect to the Opt-Out Actions (or  
 6 any future-filed actions, as appropriate). When McKinsey's 12(b)(6) Motion was being briefed,  
 7 McKinsey expressly reserved the right to move to dismiss any non-settling Political Subdivisions'  
 8 and School Districts' claims at a later time (ECF No. 445). The 12(b)(6) Motion appropriately  
 9 focused instead on other plaintiff groups because of the agreements in principle that had been  
 10 reached with the Political Subdivision and School District Plaintiffs at the time. Again, now that  
 11 the Settlements have been approved, it is proper to return to the McKinsey 12(b)(6) Motion.<sup>4</sup>

12 Two other recent developments to which Lead Counsel point should not delay the Court's  
 13 consideration of McKinsey's pending Release/Res Judicata Motion. First, in motions for a  
 14 suggestion of remand, 43 New York Political Subdivision Opt-Outs (in 2 of the Opt-Out Actions)  
 15 initially argued that, before taking any additional steps, including resolving McKinsey's pending  
 16 Release/Res Judicata Motion, the Court should ask the JPML to transfer their actions back to the  
 17 Eastern District of New York, ECF Nos. 687-688, but then changed their position on reply. They  
 18 now ask the Court first to consider motions to remand their cases to *state court*. Then, if the Court  
 19 denies their remand motions, they suggest the Court ask the JPML to transfer the cases to the  
 20 EDNY for that court to consider McKinsey's Release/Res Judicata Motion. ECF No. 691.  
 21 McKinsey addressed in its opposition and sur-reply briefs why the Court should reject these  
 22 arguments and proceed to decide McKinsey's Release/Res Judicata Motion notwithstanding any  
 23 potential remand motion. ECF Nos. 689, 693-1.

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24  
 25 <sup>3</sup> McKinsey, of course, reserves the right to renew the Release/Res Judicata Motion against any currently  
 26 nonlitigating Political Subdivision and School District Opt-Outs that may later file complaints against  
 McKinsey subject to the motion.

27 <sup>4</sup> McKinsey will meet and confer with counsel for the Political Subdivision and School District Opt-Outs, if  
 28 necessary, to set a limited supplemental briefing schedule on McKinsey's 12(b)(6) Motion.

Second, on March 28, 2024, 33 other Political Subdivision Opt-Outs from Kentucky and Michigan (the “Kentucky and Michigan Opt-Outs”) (some of whom are litigating in 2 of the Opt-Out Actions and some of whom are not) asked to extend their time to decide whether to rescind their prior opt-out notices until and including May 15, 2024. McKinsey agreed to the request, contingent on the Court’s approval and their agreement to conditions meant to avoid any prejudice to McKinsey or unnecessary delay of further proceedings, namely that: (i) such extension shall **not** operate as a further standstill of the Court’s consideration of McKinsey’s Release/Res Judicata Motion and (ii) a decision, issued on or before May 15, 2024, granting the Release/Res Judicata Motion, **shall** bind any Kentucky and Michigan Opt-Outs that have not yet rescinded their opt-out notices at such time.<sup>5</sup> Counsel for the Kentucky and Michigan Opt-Outs agreed to this proposal.

Lead Counsel’s position, stated below, does not compel a different course here regarding the proper consideration of McKinsey’s pending motions. As an initial matter, the Settlement Agreement with Lead Counsel prohibits Lead Counsel from advocating on behalf of the Opt-Outs. ECF No. 598-2 at IX(15) (“...[Lead Counsel] . . . agree[s] they shall not in any way encourage, promote, or solicit any Entity within the definition of the Class, or their counsel, to request exclusion from the Class, object to this Settlement, or seek any relief inconsistent with this Settlement.”).

In any event, McKinsey should not be prejudiced by further delaying resolution of its long pending threshold motion to dismiss while Opt-Outs continue to evaluate whether to rescind their prior opt-out notices, the first recommendation Lead Counsel make. The Opt-Outs have had many months to consider rescinding their opt-out notices and have been given sufficient information to do so since last year. While Lead Counsel may be willing to give the Opt-Outs even more leeway

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<sup>5</sup> Plaintiffs’ Lead Counsel asserts that if the extension is being provided to the Kentucky and Michigan Opt-Outs, it should similarly apply to any other opt outs that express a wish to rescind between now and May 15, 2024. (Plaintiffs’ Lead Counsel is not aware of any at this time). As explained further below, McKinsey respectfully submits that, without McKinsey’s consent and an agreement to be bound to the same terms, no other Opt-Outs subject to the Release/Res Judicata Motion should now or later be permitted to rescind their opt-out notices.

1 to make a final decision whether to join the Settlements, which in turn will further delay the final  
 2 allocation and settlement distribution to thousands of other Political Subdivisions and School  
 3 Districts, McKinsey should not be prejudiced in the meantime. McKinsey, therefore, has no  
 4 objection to any other Opt-Outs receiving the same extension as the Kentucky and Michigan Opt-  
 5 Outs, ***provided*** that it is on the same terms to avoid any unnecessary delay in resolving the  
 6 Release/Res Judicata Motion or prejudice to McKinsey.

7 Second, Lead Counsel’s recommendation that the Court should first decide any motions to  
 8 remand to state court before turning to McKinsey’s Release/Res Judicata Motion lacks any basis.  
 9 *See* ECF Nos. 690, 693-1.

10 Third, Lead Counsel is incorrect that the Release/Res Judicata “motion is, to a large extent,  
 11 moot, given it encompasses substantial argument regarding litigating class members that have now  
 12 settled.” McKinsey is asking the Court to decide the motion against litigating ***opt-outs*** and ***not***  
 13 against settling parties. And McKinsey’s Release/Res Judicata motion applies general principles  
 14 of law to the claims of all Political Subdivisions and School Districts, which McKinsey has  
 15 demonstrated are broadly consistent across all relevant jurisdictions. ECF Nos. 378, 378-1.

#### 16 Plaintiffs’ Lead Counsel’s Position

17 Plaintiffs’ Lead Counsel is amenable to an extension until May 15, 2024 to rescind any  
 18 withdrawal from the settlement. The understanding is that this additional time will allow certain  
 19 opt outs in Michigan and Kentucky to comply with their internal notice and board approval  
 20 processes, but that any opt outs that wish to rescind should be provided the same extension.  
 21 Plaintiffs’ Lead Counsel submits that an appropriate sequencing of events going forward is, first,  
 22 to allow the May 15 date to pass so that the parties and the Court understand the full universe of  
 23 opt outs and the states in which they reside; second, proceed with any remand motions so that  
 24 jurisdictional issues are resolved; and third, proceed with issuing an order on the Release/Res  
 25 Judicata issues for the remaining litigating plaintiffs over which the Court retains jurisdiction. The  
 26 existing motion is, to a large extent, moot, given it encompasses substantial argument regarding  
 27 litigating class members that have now settled. Even as to states wherein there are currently opt  
 28

outs, it is premature to resolve the Release/Res Judicata issues for those states if the date for rescinding opt outs is being extended to May 15, 2024.

In sum, Plaintiffs' Lead Counsel recommends that the more appropriate sequencing is for the Court to wait for the May 15, 2024 agreed-upon extended deadline to pass, and then, once the universe of opt-outs is fully known, proceed to remand motions to determine over which opt-outs the Court maintains jurisdiction, and then proceed to resolving the Release/Res Judicata issue as to those particular litigating entities.

Dated: April 10, 2024

Respectfully submitted,

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